NO. SC92390

IN THE MISSOURI SUPRME COURT

SNEILL, LLC,

Plaintiff-Appellant,

v.

TYBE LEARNING CENTER, INC., *et al.*,

Defendants-Respondents.

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL CIRCUIT
No. 08SL-CC00859 (Hon. Ellen H. Ribaudo, Judge)

RESPONDENT'S SUBSTITUTE BRIEF
TYBE LEARNING CENTER

THE TATE LAW FIRM, LLC

/s/ Rufus J. Tate, Jr.
Rufus J. Tate, Jr. MO46993
7751 Carondelet, Suite 803
Clayton, MO 63105-3369
314.726.6495 Office
314.726.0424 Fax
tatelawfirm@gmail.com

JOHNSON GRAY LLC

/s/ Anthony D. Gray
Anthony D. Gray MO51534
7710 Carondelet, Suite 303
St. Louis, MO 63105
314.385.9500 Office
314.594.2052 Fax
agray@johnsongraylaw.com

Counsel for TYBE Learning Center

Table of Contents

Table of Authorities

Argument

I. SNEIL NEVER ACQUIRED A STATUTORY RIGHT TO A COLLECTOR'S DEED BECAUSE IT DID NOT COMPLY WITH § 140.405.

In a first-offering land tax sale, § 140.340[1] affords TYBE a certain "right to redeem." *Id.* TYBE "has an absolute power of redemption which cannot be defeated by [Sneil] during and up to the end of the [one]-year period." *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. 1942) (construing § 140.340's predecessor statute) (alterations added).

---

[1] Section 140.340 states in pertinent part:

> The owner or occupant of any land or lot sold for taxes…***may redeem the same at any time during the one year next ensuing***, in the following manner: by paying to the county collector, for the use of the purchaser…the full sum of the purchase money named in his certificate of purchase and all the cost of the sale together with interest at the rate specified in such certificate, not to exceed ten percent annually, except on a sum paid by a purchaser in excess of the delinquent taxes due plus costs of the sale, no interest shall be owing on the excess amount, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight percent per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. *Id.* (emphasis added).

Before Sneil could acquire any interest in TYBE's land in this context, § 140.405[2] required Sneil to first notify TYBE of its "right to redeem." *Id.* ("the purchaser shall notify any person who holds a publicly recorded…mortgage…upon that real estate of the latter person's ***right to redeem*** such person's publicly recorded security or claim"). Nothing in § 140.405's explicit text purports to modify the duration of the statutory redemption period reflected in § 140.340. *Id.* More importantly, nothing in § 140.405's explicit text purports to authorize Sneil to first notify TYBE of its redemption rights after that statutory period has already passed. *Id.*

Instead, § 140.405 merely codifies a special right to a collector's deed. However, Sneil's right to a collector's deed was expressly conditioned upon its own compliance with § 140.405—not TYBE's. *See, e.g., Wentz v. Price Candy Co.*, 175 S.W.2d 852, 854 (Mo 1943) (citing 37 C.J. 686). Sneil failed to comply with § 140.405. TYBE's failure to pursue a statutory remedy under § 140.405, therefore, is irrelevant. *Id.* Accordingly,

---

[2] Section 140.405 states in pertinent part:

> Any person purchasing property at a delinquent land tax auction shall not acquire the deed to the real estate…until the person meets with the following requirement… ***At least ninety days prior to the date when a purchaser is authorized to acquire the deed***, the purchaser shall notify any person who holds a publicly recorded…mortgage…upon that real estate of the ***latter person's right to redeem*** such person's publicly recorded security or claim. Notice shall be sent by certified mail to any such person…***Failure of the purchaser to comply with this provision shall result in such purchaser's loss of all interest in the real estate***.

Id. (emphasis added).

TYBE was never required to "redeem" its property under § 140.405 since Sneil never acquired a statutory right to a collector's deed. *Id.* In an analogous case, this Court explained:

> The limitation imposed in a certain class of statutes has been held to operate on the right rather than on the remedy. Courts have distinguished between ordinary statutes of limitation and statutes creating a right with a special limitation appended to the exercise of the right on the ground the special limitation extinguishes the right rather than extinguishing the remedy. 'A wide distinction exists between statutes providing for a limitation upon the remedy, and special statutory limitations enacted in qualification of a given right…The second class of statutes are more [than mere limitations on the remedy], for they create a right of action conditioned upon its enforcement within a prescribed period, the theory being that the lawmaking body which has the power to create the right may affix the conditions under which it is to be enforced, so that a compliance with those conditions is essential. In other words, where time is made the essence of the right created, the limitation is an inherent part of the statute out of which the particular right arises, so that there is no right of action whatsoever independent of the limitation, and a lapse of the statutory period operates to extinguish the right altogether.

Wentz, 175 S.W.2d at 854.

Notwithstanding *Wentz*'s directive, Sneil relies upon *Boston v. Williamson*, 807 S.W.2d 216, 218 (Mo. App. 1991), for the proposition that timing of the § 140.405 is within Sneil's sole discretion. Sneil is wrong. Sneil's reliance is misplaced because *Boston* reflects a clear error of law. The *Boston* court held that "The notice in § 140.405 requires ninety days notice prior 'to the date when he is authorized to acquire the deed.'" *Id.*

The legal error becomes clear when one observes that the *Boston* court decoupled the pivotal phrase "to the date when he is authorized to acquire the deed" from the anchor phrase "right to redeem." *Id.* ("***At least ninety days prior to the date when a purchaser is authorized to acquire the deed***, the purchaser shall notify any person who holds a publicly recorded…mortgage…upon that real estate of the latter person's ***right to redeem*** such person's publicly recorded security or claim"). The *Boston* court essentially ruled that § 140.405's legislative reference to the "right to redeem" was "meaningless." However, "The legislature is not presumed to have intended a meaningless act." *Missouri ex rel. Bouchard v. Grady*, 86 S.W.3d 121, 123 (Mo. App. 2002) (citing *Murray v. Missouri Highway and Transp. Comm'n,* 37 S.W.3d 228, 233 (Mo. banc 2001)). This Court should not be bound by *Boston's* fundamental error and/or by Sneil's misguided notions.

II. SNEIL FAILED TO NOTIFY TYBE OF ITS STATUTORY "RIGHT TO REDEEM" UNDER § 140.340.

On September 2, 2007, Sneil issued the following "notice":

> NOTICE OF TAX SALE AND **POSSIBLE RIGHTS OF REDEMPTION**…PLEASE TAKE FURTHER NOTICE that you **may have a right to redeem** any interest you may have in the property….

L.F. 197-98. Sneil's notice referenced neither "§ 140.340" nor any of the statutory language contained therein. *Id.* Sneil clearly issued the notice after the § 140.340 statutory redemption period had passed. Sneil thereby violated § 140.405. *Id.* ("the purchaser shall notify any person who holds a publicly recorded…mortgage…upon that real estate of the latter person's ***right to redeem*** such person's publicly recorded security or claim"). As explained in Section I, above, Sneil's notice did not trigger any obligation to act on the part of TYBE. *See Wentz*, 175 S.W.2d at 854.

Moreover, Sneil's notice belies any suggestion that Sneil itself knew what TYBE's redemption rights may have been. Sneil's notice also belies any notion that it might have relied upon *Boston* before issuing the notice. This Court should not permit Sneil to effectuate a permanent taking under a ruse amounting to nothing more than utter speculation. *See Strohm v. Boden*, 222 S.W.2d 772, 776 (1949). Such speculation should be deemed fatal to Sneil's claim for a collector's deed. *Id.*

III. THE TRIAL COURT PROPERLY DETERMINED THAT SNEIL LOST ALL INTEREST IN THE COLLECTOR'S DEED WHERE SNEIL'S NOTICE(S) DID NOT INCLUDE ANY TIME COMPONENT.

Rule

Before a collector's deed can be issued, § 140.405 mandates that Sneil notify TYBE of the time component of the "right to redeem" the property. *Harpagon*, 2011 WL 3802141, *4; *Ndegwa*, 2011 WL 4790633, *8. In first tax sale offerings, the tax purchaser's notice must advise that the redemption period extends at least ninety (90) days. *Id.*

Analysis

The trial court determined that the "[n]otice sent by [Appellant] to [TYBE] in this case did not inform [TYBE] how long they had to exercise their right to redeem or be forever barred from doing so. The Notice provided neither a specific redemption period, expiration date nor a number of days indicating the length of time [TYBE] had to redeem the Property." *L.F.* 632 ¶ 3. Accordingly, the trial court concluded that "the Notice failed to comply with the requirement in § 140.405 RSMo that the property owner and other interested parties be notified of their 'right to redeem.'" *Id.*

In the instant case, Appellant admits that it did not attempt to notify TYBE of any redemption rights during the statutory redemption period. *Appln't Br.* at 3. For this reason alone, the Eastern District has recently held that "Appellant's notice was untimely and deficient under Section 140.405. As a matter of law, a collector's deed becomes void

and invalid if the purchaser fails to comply with the notice requirements of Section 140.405." *Ndegwa*, 2011 WL 4790633, *11. Accordingly, this Court should uphold the trial court's judgment.

However, Sneil now claims that its failure to include any time component in its purported notice of redemption rights constitute ***mere irregularities*** in the tax sale proceedings." Appellant's contentions lack merit. *Ndegwa*, 2011 WL 4790633, *11.

Even assuming *arguendo* that the purported notice of redemption rights was not required before the end of the statutory period, Appellant's purported notice was "insufficient," as a matter of law, because it did not inform TYBE of any redemption period at all. Appellant's misguided contention is based upon language found in *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 175 (Mo. App. W.D. 2010):

> [T]here is no due process requirement to inform those receiving notice of the specific time limits applicable for redemption, the specific procedures that must be followed, or any other details, nor is there any such requirement in § 140.405….To the extent this conclusion is inconsistent with holdings in *Keylien*, *CedarBridge*, *Hames*, and *Drake Development*, we respectfully decline to follow those cases.

Id.

However, the Western District implicitly overruled that portion of *United Asset Mgmt. Trust Co.* in *Harpagon*, 2011 WL 3802141, *4. In *Harpagon*, the Western

District Court of Appeals harmonized an apparent split between it and the Eastern and Southern Districts. The Western District court noted that the other appellate courts uniformly "have interpreted section 140.405 to require that valid notice of the right to redeem must indicate how to redeem and the appropriate redemption period." *Harpagon*, 2011 WL 3802141, *3 (construing *Drake Dev. & Constr., LLC v. Jacob Holdings, Inc.*, 306 S.W.3d 171, 174 (Mo. App. S.D. 2010) and *Keylien Corp. v. Johnson*, 284 S.W.3d 606, 613 (Mo. App. E.D. 2009)). The Western District agreed with that general declaration of law. *Id.*

The Western District "decline[s] to follow those cases," but only to the extent that those cases "require[d] the notice to mention a one-year redemption period from the sale date because that statement does not [always] accurately reflect the owner's redemption period." *Id.* ((alterations added) (construing *United Asset Mgmt. Trust Co.*, 332 S.W.3d at 164 and *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. banc 1942)). Although the appellate courts continue to disagree as to when the purported notice of redemption must be received, it is now well settled that the tax purchaser must state the applicable redemption period in its purported notice of redemption rights. *Compare Ndegwa*, 2011 WL 4790633, *11 *with Harpagon*, 2011 WL 3802141, *3 - *4.

The *Harpagon* court examined the sufficiency of the tax purchaser's notice to the record owners in which the notice was also sent after the statutory redemption period transpired. That notice "stated that the notice of the right to redeem was sent in accordance with section 140.405 and informed each that they had ninety days to redeem the property, or else their ownership interest would be forever foreclosed and barred from

redemption." *Harpagon*, 2011 WL 3802141, *4. The court found that the tax purchaser's notice was "sufficient." *Id.* (explicitly adopting the Eastern and Southern District sufficiency approach).

In the instant case, Sneil's notice did not advise TYBE of any specific redemption period at all in which to act "or be forever foreclosed and barred from redemption." *L.F.* 632. Sneil thereby failed to meet the minimal sufficiency standard outlined in *Harpagon*, 2011 WL 3802141, *4 or *Ndegwa*, 2011 WL 4790633, *11. Accordingly, this Court should uphold the trial court's judgment.

IV. SNEIL WAIVED APPELLATE REVIEW OF WHETHER THE TRIAL COURT FAILED TO MAKE SPECIFIC FINDINGS OF FACT BY FAILING TO FILE A MOTION TO AMEND THE JUDGMENT IN ACCORDANCE WITH RULE 78.07(c).

Rule

A land tax sale purchaser either retains or forfeits its interest in the requested "collector's deed" based upon the trial court's close scrutiny of compliance with, *inter alia*, § 140.405. *Ndegwa*, 2011 WL 4790633. An appellant "who fail[s] to file any post-trial motions, including a motion to amend the judgment," and subsequently "complain[s] that the trial court entered judgment without making specific findings of fact" has "waived" appellate review. *See, e.g., Country Club of the Ozarks, LLC v. CCO Investments, LLC*, 338 S.W.3d 325, 336 (Mo. App. 2011) (construing Rule 78.07(c)). Rule 78.07(c) states that "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be

raised in a motion to amend the judgment in order to be preserved for appellate review." *Id.* "The broad language of 78.07(c) encompasses complaints regarding required findings whether mandated by statute or Supreme Court Rule." *Coffman v. Coffman*, 300 S.W.3d 267, 273 (Mo. App. 2009).

Analysis

Appellant contends that its pre-trial request "contains 46 requests for findings of fact and 60 requests for conclusions of law." *Sneil Br*. at 57. Sneil asserts that the trial court failed to make some of its requested findings of fact in this land tax sale case. Sneil further contends that the "[f]ailure of a court to prepare specific findings of fact as requested by counsel is error, and mandates reversal when such failure materially affects the merits of the action or interferes with appellate review." *Id.* at 61. The trial court however made certain specific findings of fact and concluded that Sneil forfeited its interest in the "collector's deed." *L.F.* 625-33. In light of *Country Club of the Ozarks, LLC* and *Coffman*, Sneil has waived review of any other requested findings of fact.

It is true that the trial court's conclusion that Sneil was not entitled to a "collector's deed" in accordance with § 140.405 must have been based upon the absence of certain facts more favorable to Sneil. However, it is equally true that Sneil did not raise such concerns in a motion to amend the judgment. Most pertinent, Sneil did not file any motion akin to a motion to amend the judgment. It is well-settled that a land tax sale purchaser who fails to file a post-trial motion to amend the judgment has thereby waived appellate review of the absence of otherwise requested findings of fact. *Country Club of*

the Ozarks, LLC, 338 S.W.3d at 336; *Coffman*, 300 S.W.3d at 273. Accordingly, this Court should uphold the trial court's judgment.

CONCLUSION

This Court should affirm the trial court's judgment in accordance with *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (holding that "judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law"). This Court "should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." *Id.* Sneil has not presented such a case.

Respectfully submitted,

THE TATE LAW FIRM, LLC

/s/ Rufus J. Tate, Jr.
Rufus J. Tate, Jr. MO46993
7751 Carondelet, Suite 803
Clayton, MO 63105-3369
314.726.6495 Office
314.726.0424 Fax
tatelawfirm@gmail.com

JOHNSON GRAY LLC

/s/ Anthony D. Gray
Anthony D. Gray MO51534
7710 Carondelet, Suite 303
St. Louis, MO 63105
314.385.9500 Office
314.594.2052 Fax
agray@johnsongraylaw.com

Counsel for TYBE Learning Center

Rule 84.06 Certification

I hereby certify that TYBE's Substituted Brief complies with Rule 84.06(b) because it contains 2,777 words and 255 lines—exclusive of the tables of contents and authorities. In accordance with Rule 84.06(h), the Brief has been scanned for viruses and is virus-free. It appears in Word 2007 format and shall be served upon the Clerk and counsel of record by E-filing.

Certificate of Service

I hereby certify that on April 23, 2012, I delivered by E-filing an exact duplicate of the foregoing TYBE's Substitute Brief to:

Phillip K. Gebhardt, Esq.
1720 North Main Street
DeSoto, MO 63020
phil.gebhardt@lienfunds.com
stanley.schnaare@sbcglobal.net
Counsel for Sneill, LLC

Debbie Volmert, Esq.
530 Fullerton Road, Suite A
Belleville, IL 62222-0464
debbievolmert@sbcglobal.net
Counsel for Regions Bank